(8)

No. 89-7260

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM J. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

JOHN G. ROBERTS, JR.
Acting Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

33 pp

QUESTION PRESENTED

Whether a district court is required to notify the defendant in advance of its intent to depart upward from the range of sentences prescribed by the Sentencing Guidelines, and of the grounds for the departure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules:

Statutes and rules—Continued Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-7260

WILLIAM J. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, J.A. 74-87, is reported at 893 F.2d 1343.

JURISDICTION

The judgment of the court of appeals, J.A. 88, was entered on January 12, 1990. A petition for rehearing was denied on March 15, 1990. J.A. 89. The petition for a writ of certiorari was filed on April 19, 1990, and was granted on June 28, 1990. J.A. 91. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following his guilty plea in the United States District Court for the District of Columbia, petitioner was convicted of theft of government funds, in violation of 18 U.S.C. 641; making false claims against the government, in violation of 18 U.S.C. 287; and attempting to evade the payment of income taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to 60 months' imprisonment, to be followed by a three-year term of supervised release. J.A. 67, 74. The court of appeals affirmed. J.A. 74-87.

1. Between 1982 and 1988, petitioner used his position as a supervisor in the Financial Management Section of the Agency for International Development (AID) to divert funds from an unused travel account to a bank account in the name of Vincent Kaufman. Petitioner approved disbursements from the fund for the purported purpose of paying "Kaufman" to move furniture for AID. In reality, "Kaufman" did not exist, no work was performed, and petitioner controlled the bank account into which the funds were deposited. Before the scheme was discovered, petitioner embezzled a total of more than $1.2 million. Because petitioner failed to report the stolen funds on his income tax returns, he underpaid his federal income taxes by $475,685. J.A. 13-14, 75.

Petitioner pleaded guilty pursuant to an agreement that stated the parties' understanding that his sentence would be governed by the Sentencing Guidelines, that his offense level would be 19, and that his criminal history category would be I. J.A. 5. The presentence report prepared by the Probation Office agreed with the parties' calculation, and stated that the Guideline sentence for that offense level and criminal history category would be 30 to 37 months' imprisonment. J.A. 15-16. The presentence report also set forth the probation officer's opinion that "[t]here are no factors that would warrant departure from the guideline sentence." J.A. 21.

Both parties acknowledged the factual accuracy of the presentence report. J.A. 32-33, 36. At the sentencing hearing, petitioner's counsel—apparently recognizing the possibility of an upward departure—urged the district court to "consider a sentence within the guidelines." J.A. 45.[1] The prosecutor made no specific sentencing recommendation, but asked the district court to impose a sentence that reflected that petitioner's embezzlement was "one of the largest single thefts of public funds committed in the history of the [A]merican criminal law." J.A. 47.

After hearing the parties' comments on the appropriate sentence for petitioner's crime, the district court sentenced petitioner to 60 months' imprisonment. J.A. 55. The court departed upward from the Guidelines range because petitioner's offense was of unusual duration, because petitioner had abused the process on which the government relied to pay legitimate vendors, and because petitioner's income tax evasion had served to conceal his theft of government funds. J.A. 52-55; see J.A. 65, 70-73.

Petitioner did not object to the district court's upward departure from the Guidelines range, nor did he object that the grounds of departure came as a

---

[1] The court had warned petitioner before accepting his guilty plea that it had "the authority in some circumstances to impose a sentence that is more severe or less severe than the sentence called for by the guidelines." 8/11/88 Tr. 14. The court also cautioned petitioner that he could be sentenced to up to 20 years in prison. *Id.* at 15.

surprise. Moreover, counsel did not object to the fact or basis of the district court's upward departure. He did object at length, however, to the district court's order directing that petitioner be taken into custody immediately and not accorded the privilege of voluntary surrender. J.A. 57-62.

2. The court of appeals held that the district court's grounds for departing upward from the Guidelines range were proper and that the sentence imposed was reasonable. J.A. 78-83.[2] The court of appeals further held that the district court was not required to notify petitioner in advance that it might depart from the Guidelines range or state beforehand its reasons for considering an upward departure. J.A. 83-85. The court noted that "[p]re-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation," and it found nothing in the Guidelines or in Rule 32 of the Federal Rules of Criminal Procedure that changed that practice. J.A. 84.

The court of appeals also found that petitioner was not harmed by the lack of notice. The court noted that petitioner had an opportunity to address the district court and challenge the factual basis for the upward departure prior to sentencing, and he had an opportunity to test the legal basis for the departure in the court of appeals. The court explained: "All of the facts that formed the basis of

---

[2] Although petitioner mentions the arguments rejected by the court of appeals as ones that "almost certainly would have been presented to the sentencing court if notice had been given," Pet. Br. 31 n.20, petitioner does not renew his contention that the district court's upward departure was not "reasonable" under the Guidelines, 18 U.S.C. 3742(e).

[the district court's] decision were contained in the presentencing report, and [petitioner] could have challenged the factual findings if he had believed that they were erroneous"; "[his] right to appeal preserves his ability to challenge the *legal* ground on which the departure decision rests." J.A. 84-85 (emphasis in original).

SUMMARY OF ARGUMENT

A. The Due Process Clause does not require that a defendant be given advance notice of a district court's intention to depart from the sentencing range prescribed by the Sentencing Guidelines. Trial courts have traditionally imposed sentence without observing the procedural formalities applicable to criminal trials, and this Court has consistently upheld that practice against due process challenges. The sentencing court's discretionary authority to depart from the Sentencing Guidelines range without advance notice to the defendant falls comfortably within the tradition of sentencing discretion historically exercised by trial judges and held to satisfy due process.

In light of the well-settled practice of conducting sentencing proceedings without the kind of "notice and comment" procedure that petitioner seeks, the Court need not conduct a detailed "cost-benefit" analysis under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), to determine whether such a procedure is required by the Due Process Clause. Even under *Eldridge*, the balance of interests does not require a court to give advance notice of a possible departure from the Guidelines sentencing range. Existing procedures already go far to protect against sentencing based on inaccurate information. A constitutional requirement of advance notice of the possibility and

grounds for a departure could impose a substantial burden on federal district courts and would not significantly improve the accuracy of sentencing proceedings. Moreover, the principle underlying such a notice requirement—that a defendant has a constitutional right of allocution that is meaningful only if he knows the expected sentence and the reasons for it—would render "fundamentally unfair" sentencing hearings as they are now conducted and have long been conducted in the vast majority of state courts. Before requiring a wholesale revision in the way sentencing is conducted in this country, the Court should insist that the proposed procedure be of far greater importance to the fair conduct of sentencing proceedings than the "notice and comment" procedure that petitioner asks this Court to adopt.

B. In the Sentencing Reform Act of 1984, Congress established a detailed procedure for imposing sentence. That procedure includes a requirement that a defendant have "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." It does not, however, require advance notice that the district court may depart from the Guidelines sentencing range and the reasons for that departure. In light of the detailed and comprehensive provisions of the federal law governing sentencing proceedings, the omission of any requirement of advance notice of a district court's intention to depart from the Sentencing Guidelines is quite telling. Congress clearly intended to create a complete set of written rules for sentencing proceedings that would guarantee fair proceedings and yet be unmistakably clear and easy to follow. It did not intend the rule it created to serve simply as a skeleton around which the courts

would fashion other rules designed to improve upon the system Congress prescribed. Notice of the kind proposed by petitioner may or may not be a good idea; but if it is to be adopted, it should be done through the rulemaking process, not through case law development.

ARGUMENT

A DISTRICT COURT IS NOT REQUIRED TO GIVE ADVANCE NOTICE THAT IT MAY DEPART FROM THE RANGE OF SENTENCES PRESCRIBED BY THE SENTENCING GUIDELINES

A. The Due Process Clause Does Not Require A District Court To Give Advance Notice Of A Prospective Departure Decision

It is well settled that the Due Process Clause does not require state and federal judges imposing sentence to observe the procedural formalities applicable to criminal trials or agency adjudications. As this Court explained in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959):

> once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.

Id. at 584; accord *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The evaluation of such evidence is not governed by the "beyond a reasonable doubt"

standard applicable to criminal trials, or even by the "clear and convincing evidence" standard; to the contrary, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986).

In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court upheld a death sentence imposed by a state trial judge over the jury's recommendation of mercy; the judge's contrary decision rested in part on hearsay information in a presentence report. The defendant argued that the admission of that information violated his due process right to be "given reasonable notice" and "an opportunity to examine adverse witnesses." *Id.* at 243, 245. This Court rejected defendant's challenge and held that "the Due Process Clause did not require a State to choose between prohibiting the use of such reports and holding an adversary hearing." *McGautha* v. *California*, 402 U.S. 183, 218 n.22 (1971).[3] In *Specht* v. *Patterson*, 386 U.S. 605, 606 (1967), this Court characterized *Williams* broadly as holding that the Due Process Clause does "not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed."

In light of the traditional authority of state and federal trial judges to impose sentence in criminal cases without any fixed procedures, petitioner bears a heavy burden in arguing, see Pet. Br. 21-27, that

[3] Although *Williams* v. *New York* remains good law in non-capital cases, its holding as applied to capital cases was qualified by *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion).

imposing a lawful sentence is "fundamentally unfair" in the absence of prior notice of both the court's inclination to impose that sentence and the reasons for doing so. As the court of appeals observed, petitioner's suggestion "would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges." J.A. 84. Because such " 'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta* v. *United States*, 109 S. Ct. 647, 669 (1989) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)), this Court should not lightly assume their constitutional deficiency. See *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (" 'If a thing has been practised for two hundred years by common consent, it will need a strong case' to overturn it." (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.)); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961) (due process is "compounded of history, reason, [and] the past course of decisions").[4] We are not aware of a single State that has adopted the kind of notice requirement that petitioner proposes, and, as petitioner acknowledges,

[4] See also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-277 (1856) ("To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common law and statue law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."); *id.* at 279-280.

Pet. Br. 14, Congress has not expressly adopted that requirement either.

2. Congress's enactment of a guidelines sentencing system does not change the due process calculus. The principal change wrought by the Sentencing Guidelines is that the presence or absence of particular facts now has an objectively measurable effect on a defendant's sentence, while under the prior system it did not. But the fact that the sentencing process has been made more rational and predictable does not mean that the Constitution now requires more procedural protections than it did in the past. At the time it created the Guidelines system, Congress amended Federal Rule of Criminal Procedure 32 to institute an elaborate system of procedural protections for the sentencing process. Those protections went far beyond what any Rule, statute, or court decision had previously mandated, but they did not include the "prior notice and explanation" requirement that petitioner advocates. Petitioner's position is that in spite of the many protections afforded by Rule 32, sentencing proceedings are nonetheless constitutionally invalid if the district court fails to notify a defendant of its intention to impose a sentence outside the Guideline range and its reasons doing so. Yet that challenge is no different in principle from one directed to an unexpectedly harsh but legal sentence imposed by a district court before the Guidelines took effect, or to such a sentence if imposed by the vast majority of state trial judges today. It should therefore fare no better under this Court's precedents than previous challenges to trial courts' wide leeway to select the procedures they will follow in sentencing criminal defendants.

3. Petitioner relies on the balancing test for due process analysis set forth in *Mathews* v. *Eldridge*,

424 U.S. 319, 335 (1976), but that test does not dictate a different result. In *Eldridge*, the Court held that to identify the specific dictates of due process in particular settings, it is ordinarily necessary to consider three factors: (1) the private interest affected by governmental action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedures; and (3) the burden on the government of the proposed procedures. *Ibid.*

In the realm of sentencing, this Court has already concluded that due process is satisfied by holding a hearing at which the defendant is permitted to present his case. This Court has never suggested that a sentencing court must give the parties notice of the proposed sentencing decision or the reasons for it.

In *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), the Court declined to engage in a detailed balancing of the costs and benefits of a proposed requirement of "written notice of the precise time of the [parole] hearing reasonably in advance of the hearing, setting forth the factors which may be considered by the Board in reaching its decision." *Id.* at 6. Nebraska provided notice of the hearing date but not of the Board's intentions regarding the inmate's parole or the reasons for its proposed decision. *Id.* at 14 n.6. The Court explained that Nebraska's parole statute resembled a "sentencing judge's choice * * * to grant or deny probation following a judgment of guilt, a choice never thought to require more than what Nebraska now provides for the parole-release determinations." *Id.* at 16. Accordingly, the Court rejected the proposed notice requirement. *Id.* at 14 n.6; see *Bowles* v. *Tennant*, 613 F.2d 776, 779 (9th Cir. 1980) (applying *Greenholtz* to federal parole statute

and holding that due process does not require "advance notice of the factors that may be considered at the parole hearing"). As the Court's reference to the sentencing analogy suggests, if prior notice of a decisionmaker's tentative decision and reasons concerning the length of incarceration is not required in the administrative parole context, there is no reason to suppose it should be required in the case of sentencing by state and federal judges.

Even if it is necessary for the Court to apply the three-part balancing formula from *Eldridge*, the case for petitioner's proposed procedure is still not made out. In applying *Eldridge* it is important to keep in mind that the object of the inquiry is not to determine whether a proposed procedural safeguard is a "good idea," but to ascertain whether its absence renders the existing procedure fundamentally unfair. Even when analyzed under the *Eldridge* test, the absence of petitioner's procedure does not have that effect. While convicted defendants obviously have a great interest in the amount of time they will spend in prison, a sentencing decision of the sort at issue in this case is not likely to be affected significantly by the procedure petitioner proposes. Current procedures ensure that the district court has a sound factual basis for departing from the Guidelines range and that the departure is reasonable. The district court must "state in open court the reasons for its imposition of the particular sentence" and in particular must state "the specific reason for the imposition of a sentence" that is outside the Guidelines range. 18 U.S.C. 3553(c). A sentence that is outside the Guidelines is reviewable if the departure, in light of the district court's statement of reasons, was legally impermissible or otherwise unreasonable. 18 U.S.C. 3742.

Petitioner responds that prior notice of a court's intention to depart would alert defense counsel to "appeal[] more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure." Pet. Br. 30-31 (quoting *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990)). But that is precisely what petitioner's trial counsel did in his extended plea in mitigation, see J.A. 40-45, which concluded by "ask[ing] [the district court] to consider a sentence within the guidelines." J.A. 45. For that matter, it is what any competent trial counsel would do. Advance notice that the court may depart from the Guidelines sentencing range—which the law clearly entitles the court to do—would tell defense counsel nothing he did not already know.

If the notice requirement were interpreted to include a pre-hearing statement of the court's reasons for its sentence, as petitioner proposes, see Pet. Br. 26 n.16, 27, it would impose a substantial burden on sentencing judges. Under that kind of notice requirement, a district court would have only two options. One would be to review the presentence report and circulate a proposed sentence and statement of reasons in advance of the sentencing hearing. That option would make the district court reach a tentative but public judgment as to the appropriate sentence before hearing from the parties at the sentencing hearing. Besides requiring the court to make an initial sentencing judgment without the benefit of the parties' evidence and argument, it might make district courts reluctant to modify their initial sentencing judgments based on the parties' presentations at the sentencing hearing. If that happened, the sentencing hearing could end up being a procedurally elaborate, but substantively pointless exercise.

A second option would be to conduct sentencing hearings as they are conducted at present, and to order a recess in the event the court finds it proper to depart from the Guidelines sentencing range. But to require a second sentencing hearing in any case in which a departure is contemplated would greatly burden the district courts. The Sentencing Commission estimates that departures from the Guidelines range occur in approximately 12.2% of all cases. United States Sentencing Comm'n, *Annual Report* 47 (1989). Presumably, district courts consider the possibility of departure in many more cases than that. Since federal district courts sentence more than 40,000 defendants each year,[5] it would be very burdensome to require multiple sentencing hearings in a significant percentage of those cases. The court of appeals was therefore correct in concluding that, under either scenario, petitioner's notice proposal would impose a "cumbersome burden on trial judges." J.A. 84.[6]

Moreover, because there is no principled way to limit a due process notice obligation to departure decisions under the federal Sentencing Guidelines, it is likely that the eventual costs of adopting the prin-

[5] A total of 44,524 defendants were convicted and sentenced in federal district courts during the year ending June 30, 1989. *Annual Report of the Director of the Administrative Office of the United States Courts* 279 (1989).

[6] Of course, if the notice requirement were interpreted to require only that the district court announce its decision to depart at some point during the sentencing hearing, without the need to conduct a second hearing at a different time, the costs of the notice requirement would be minimal (although it would still create a trap for the unwary district judge who does not remember to issue such a solicitation of objections). But the benefits of such on-the-spot notice to defense counsel would be correspondingly small.

ciple petitioner advocates will be much higher. If departure notice is required as a matter of "fundamental fairness," it must be because a defendant has a right to allocution[7] that can be meaningfully exercised only if the defendant knows the judge's tentative sentencing decision and the reasons for it. That analysis, however, would cast constitutional doubts over sentencing proceedings as they are now conducted in the vast majority of state courts, which do not use a guideline system of sentencing. Before embarking on a course that would require such a dramatic departure from the Court's prior precedents regarding sentencing and would have such a profound impact on sentencing proceedings in the state court systems, this Court should require a very strong showing that the procedure that petitioner advocates is essential to achieve fairness in sentencing. Petitioner has not pointed to any unfairness in this case or any pattern of unfairness in general that would justify a constitutional change of that magnitude.

Finally, in considering the constitutional status of the procedure petitioner proposes, it is important to note how unusual that procedure would be. Petitioner is in effect asking for a constitutional rule requiring a "notice and comment" procedure before a departure sentence is imposed. But while notice and comment procedures are sometimes required by statute, we know of no case in which this Court has imposed such a requirement as a constitutional matter. To the contrary, most legal proceedings are conducted

[7] This Court has never decided the question whether "due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." *McGautha* v. *California*, 402 U.S. at 218.

without any such procedure. For example, a district court conducting a bench trial is not required to give advance notice of its intention to find a defendant guilty and to give the reasons for that finding before entering it so that the defendant can attempt to dissuade the court from ruling that way. See Fed. R. Crim. P. 23(c). Nor is a court required to submit tentative findings to the parties for their comments before entering a judgment in a non-jury civil case, even if the theory on which the court bases its ruling differs from the theories advanced by the parties. See Fed. R. Civ. P. 52. If due process does not require an opportunity for comment on the court's tentative judgment in those cases, it is difficult to understand why the same Due Process Clause requires that kind of opportunity in the context of criminal sentencing.

B. The Sentencing Reform Act Does Not Require Advance Notice Of A District Court's Departure Decision

1. As part of the Sentencing Reform Act of 1984, Congress amended Federal Rule of Criminal Procedure 32, which governs sentencing proceedings in federal courts. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215, 98 Stat. 2014-2015. In the same Act, § 212(a)(2), 98 Stat. 1987-2001, Congress revised Chapter 227 of Title 18 and prescribed the procedures to be followed with respect to presentence reports, 18 U.S.C. 3552, the imposition of sentence, 18 U.S.C. 3553, and a variety of other matters.

Rule 32 and Chapter 227 set forth in great detail the procedures that a district court must follow in imposing sentence. The probation officer must conduct a presentence investigation and prepare a report. The report must contain various elements, including "an explanation by the probation officer of

any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances." Fed. R. Crim. P. 32(c)(2)(B). In addition, the district court must provide the parties "with notice of the probation officer's determination * * * of the sentencing classifications and the sentencing guideline range believed to be applicable to the case." Fed. R. Crim. P. 32(a)(1). The presentence investigation report must be provided to the defendant and his counsel at least ten days before the sentencing hearing, unless the defendant waives that minimum period. 18 U.S.C. 3552(d); Fed. R. Crim. P. 32(c)(3).

At the sentencing hearing, the district court must "afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1). Before imposing sentence, the district court must verify that the defendant and his counsel have had the opportunity to read and discuss the presentence report, and the court must afford the defendant and counsel an opportunity to address the court "and to present any information in mitigation of sentence." Fed. R. Crim. P. 32(a)(1)(A)(B) and (C).

After the district court resolves disputed issues of fact under the procedures set forth in Rule 32, the court must impose a sentence within the presumptively applicable range set by the Sentencing Guidelines, unless it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18

U.S.C. 3553(b). At the time of sentencing, the court must "state in open court the reasons for its imposition of the particular sentence, and, if the sentence * * * is outside the range * * * the specific reason for the imposition of a sentence different from that described." 18 U.S.C. 3553(c).

The degree of detail in Rule 32 and Chapter 227 indicates that the sentencing procedures Congress adopted were not simply a sketchy procedural outline, to be filled in with other requirements as the courts devise them. Instead, Congres created a complete set of rules, compliance with which satisfies all legal requirements for sentencing. In light of the comprehensiveness of the procedural scheme, it is quite telling that Congress did not include in the package of procedures a requirement that the district court notify the parties in advance of the possibility and grounds for a departure from the Guideline sentence.[8] Cf. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-147 (1985) (declining to imply private remedy from ERISA because carefully integrated scheme provided "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly"); *Milwaukee* v. *Illinois*, 451 U.S. 304, 319 (1981) (enact-

[8] Although petitioner is correct that several courts of appeals have found an implied right to notice of a proposed departure from the guidelines sentence, see Pet. Br. 12-13 n.4, he incorrectly identifies the First Circuit as among those courts that have found such an implied right. The First Circuit rejected a notice challenge for several reasons, the first of which was that a defendant's right to "notice of any facts that will affect his sentence and a meaningful opportunity to respond" is satisfied by the inclusion of those facts in the presentence report, even if the probation officer "wrote in the report that he 'ha[d] not identified any information that might warrant departure from the guidelines.'" *United States* v. *Hernandez*, 896 F.2d 642, 644 (1990).

ment of comprehensive statutory program by Congress "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law").

While Congress failed to include a presentence "notice and comment" requirement of the sort petitioner proposes, it did include several other express notice requirements in the Sentencing Reform Act of 1984. First, it required notice and an opportunity to comment on the presentence investigation report. 18 U.S.C. 3552(d); Fed. R. Crim. P. 32(a)(1) and (c)(3). Second, it required that before ordering a defendant to give notice to the victim of his crime, the court "shall give notice to the defendant and the Government that it is considering imposing such an order." 18 U.S.C. 3553(d). Third, it required that before imposing an order of restitution the court must disclose to the parties the portions of the presentence report pertaining to the matters that the statute makes relevant to the issue of restitution. 18 U.S.C. 3664.

Petitioner recognizes the parallel between notice of the probation officer's report and notice of a proposed departure from the Sentencing Guidelines. Indeed, he contends that his proposal "is no more cumbersome than the formal procedure required when the [presentence investigation] report recommends upward departure." Pet. Br. 27. The critical difference between the two, however, is that Congress expressly required the district court to provide the parties with notice of the probation officer's determination, but it imposed no such requirement of advance notice of possible departure by the court.

The notice given prior to an order to inform victims about the defendant's conviction is even more closely analogous to the kind of notice for which petitioner is contending here. Section 3553(d) requires

that before a court orders a defendant to inform the victims about his conviction, the court must give the defendant notice that it is considering entering such an order. That is precisely the kind of notice that petitioner claims he should have received before the district ~~court~~ imposed sentence in this case.

Because Congress specifically required advance notice where it considered such notice to be appropriate, Congress's failure to require such notice prior to a departure from the Guidelines range is strong evidence that the omission was intentional. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (inappropriate to assume a time limitation in a silent statutory provision when "the very next provision of the Act contains just such an express time restraint"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In the Sentencing Reform Act, Congress struck a balance on matters of procedure; it did not envision either casual sentencing hearings or sentencing mini-trials. Some procedures that had not previously been required were imposed by statute and rule; others were omitted or left to the district courts to employ in their discretion in particular cases. See, *e.g.*, 18 U.S.C. 3553(d) ("the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process"); Fed. R. Crim. P. 32(c)(3)(A) ("in the discretion of the court," sentencing court may permit the defense "to introduce testimony or other information relating to any alleged factual inaccuracy contained in [the presentence investigation report]").

From the structure and background of the statute, it is clear that Congress intended to limit the discretion of district courts in the sentencing process, but to do so selectively. The Sentencing Reform Act cannot be understood as an invitation to appellate courts to create additional procedures in order to make the ones Congress enacted work better. As the Senate Report on the 1984 Act explained,

> [t]he sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.

S. Rep. No. 225, 98th Cong., 1st Sess. 150 (1983). The Report noted that the availability of a detailed presentence report would ensure that "the defendant and the government have sufficient information concerning the basis for a sentencing decision to enable them to prepare for the sentencing hearing." *Id.* at 74. The Report warned that the district court's statement of reasons should not become a "legal battleground" at the hearing for challenging a sentence within the Guidelines range or for "mak[ing] judges reluctant to sentence outside the guidelines when it is appropriate." *Id.* at 79-80. This commentary makes it clear that Congress did not intend appellate courts to undermine the discretion of sentencing courts when interpreting the procedures Congress required. It is therefore highly unlikely that Congress wanted the appellate courts to do the same thing by imposing procedural burdens that Congress did *not* require.

2. The Sentencing Guidelines do not require advance notice of a district court's intention to depart from the Guidelines range. The commentary to the policy statement in Section 6A1.3 of the Sentencing Guidelines, entitled "Resolution of Disputed Factors (Policy Statement)," states that the resolution of disputes regarding "particular offense and offender characteristics" will necessitate "[m]ore formality" in sentencing hearings "if the sentencing process is to be accurate and fair." United States Sentencing Comm'n, *Guidelines Manual* § 6A1.3, commentary (Nov. 1989). Petitioner contends that the reference to "[m]ore formality" constitutes a "clear direction" from the Sentencing Commission to depart from pre-Guidelines practice and require advance notice of the possibility and bases of departure. Pet. Br. 20-21.

Contrary to petitioner's claim, the quoted language does not support a requirement of advance notice of a court's intention to depart from the Guidelines sentencing range. The Commission's commentary, which uses very general terms, refers to the need for more formality in order to ensure that disputes regarding offense and offender characteristics are resolved correctly. Those factual matters, which must be resolved by empirical evidence, bear on the defendant's offense level and criminal history category; they determine what the appropriate Guidelines range should be. The offense level and criminal history category, however, do not govern the discretionary decision whether a departure is called for in a particular case.

The Sentencing Commission apparently decided to leave the issues in Section 6A1.1 as policy statements rather than Guidelines because the procedural issues there addressed are "more appropriately covered by the Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference." United States Sentencing Comm'n, *Guidelines Manual* App. C, at C.30 (Nov. 1989). Significantly, the Model Local Rule does not require advance notice of departure decisions, but mentions only that district judges might want to give the parties the opportunity to object before imposing sentence:

> It would appear to be good practice, particularly in the early days of guideline sentencing, to state proposed findings and conclusions, and perhaps to state the proposed sentence, and then to give the parties an opportunity to object before sentence is actually imposed.

Judicial Conference of the United States, Committee on the Administration of the Probation System—Recommended Procedures for Guideline Sentencing and Commentary (1987), *reprinted in* T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* App. 8, at 438 (Supp. App. 1989 ed.). That tentative suggestion of a "good practice" that district courts might "perhaps" wish to employ hardly rises to the level of a binding command. And even if it did, petitioner had an opportunity in this case to object to the district court's sentence, as shown by his counsel's extended effort to win for him the privilege of voluntary surrender. See J.A. 57-62. Counsel's failure to object to the district court's upward departure from the Guidelines range may have reflected his view that such an objection would have been fruitless, but that is a reflection of the limited value of the right rather than the unavailability of the opportunity.

3. Petitioner contends that notice of the court's intention to depart from the Guidelines sentence is required to make "meaningful" the opportunity provided by Rule 32 to comment on "other matters relating to the appropriate sentence." See Pet. Br. 8,

14-15, 19. Petitioner's argument in essence is that the right to comment implies the right to notice of any matter that may be worth commenting upon. But that is clearly not correct. A right to comment is a right to be heard, not a right to be informed. If Congress had wanted to enhance the defendant's right to information, it would not have done so by reference to a right to "comment," and it surely would have chosen less open-ended language than "other matters relating to the appropriate sentence." [9]

A right to notice of "other matters relating to the appropriate sentence" would be impossible to confine. Petitioner sees that as a virtue. Notice, as he views it, should help reveal the district court's "assessment of the case," Pet. Br. 11, help "focus the discussion at the sentencing hearing," Pet. Br. 16 n.6, and direct the parties to "address the court's

[9] Petitioner argues that the "comment" language added to Rule 32(a)(1) in 1984 must carry with it an implied right to notice of a proposed departure, because otherwise that language would be superfluous in light of the provision already in the Rule guaranteeing a right of allocution by the defendant and his counsel. Pet. Br. 14-15. The "comment" language is not superfluous. It was added to make clear that the defendant was entitled to address any points made in the probation officer's report; the reference to "other matters relating to the appropriate sentence" was added to avoid the possible inference that the right to comment was somehow *limited* to the contents of the probation officer's report. The addition of the express right to comment on the report and other matters was necessary to make clear that the defendant's right to participate in the sentencing hearing extended beyond the general plea for mercy that comprised the right to allocution in traditional practice. See *Green* v. *United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (describing common-law right of allocution).

concerns," Pet, Br. 11. But to adopt petitioner's construction of the right to comment as implying the right to notice, and thus to require advance notice of any matter that may bear on the court's sentencing decision, would guarantee procedural chaos. Extended litigation would be required to flesh out the scope of the notice requirement by determining whether, for example, notice is required before downward departures as well as upward departures,[10] and whether notice is required with respect to the factors influencing the district court's selection of a sentence within the Guidelines range as well as decisions to depart.[11]

Petitioner seeks to address the problem of defining what matters would be subject to the notice requirement by suggesting that notice might be limited to "matter[s] critical to the sentencing process." Pet. Br. 8. That formulation, however, merely shifts the focus of the inquiry to what matters are important enough to merit advance notice. It does nothing to help define the scope of the court-made notice requirement. And even if it did, the courts would still be left to work out, on a case-by-case basis, numerous ancillary issues such as when and how notice must

[10] See *United States* v. *Jagmohan*, No. 90-1045 (2d Cir. July 13, 1990), slip op. 5534-5535 (requiring notice before downward departures).

[11] See *United States* v. *Ford*, 889 F.2d 1570, 1572 & n.3 (6th Cir. 1989) (rejecting defense counsel's argument that Fed. R. Crim. P. 32(a)(1) requires district courts "to give the parties advance notice of and a chance to comment on the judge's interpretation of the facts" and noting that acceptance of defendant's argument would mean the district judge "in all cases would be required to set forth in advance his reasons for imposing a specific sentence within the guideline").

be given. For example, courts would have to fashion rules as to whether notice at the sentencing hearing is sufficient, or whether it must be provided in advance of the hearing in order to be "meaningful," [12] and if so, how far in advance.[13] The specificity of the notice would also be subject to dispute.[14]

To assign the courts the task of fashioning an uncodified body of sentencing rules of the sort petitioner proposes would be entirely inconsistent with the congressional goal of devising a comprehensive set of written rules to govern the sentencing process. The district courts already have plenty to do in attempting to comply with the complex system of Sen-

[12] Compare *United States* v. *Hedberg*, 902 F.2d 1427, 1428 (9th Cir. 1990) (notice is not required prior to sentencing hearing), and *United States* v. *Hernandez*, 896 F.2d at 644 (notice at sentencing hearing complies with rule adopted by other circuits), with Pet. Br. 26 n.16 (suggesting that notice should "[n]ormally" be given "prior to the sentencing hearing," and if notice is given at the hearing, "a postponement may be necessary").

[13] Cf. *United States* v. *Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) (intimating that the ten-day advance notice requirement applicable to presentence reports would be applicable to notice of departures from the Guidelines range).

[14] Compare *United States* v. *Hernandez*, 896 F.2d at 644 (mention in presentence report of facts on which district court based departure provided sufficient notice), with *United States* v. *Hedberg*, 902 F.2d at 1428-1429 (presentence report must list all factors supporting departure), *United States* v. *Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989) (notice in presentence report of departure on one factor does not supply notice on unlisted factors), and *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990) (notice in persentence report of factor supporting departure insufficient because it did not include reference to defendant's state of mind).

tencing Guidelines promulgated by the Sentencing Commission. Nothing in the Sentencing Reform Act or the Sentencing Guidelines requires that the courts bear the additional burden of creating and shaping a new set of principles governing notice requirements for sentencing proceedings.[15]

It may or may not be a good idea for a district court to provide the parties with notice of the court's intention to depart from a Guidelines sentence. If it is, the proper way for that good idea to become law is for it to be incorporated into the Rules of Criminal Procedure or Title 18 of the United States Code. In that way, the rule can be adopted through the legislative or rulemaking process, applied uniformly, and fashioned in a way that will minimize administrative burdens and difficulties in interpretation. In the meantime, however, there is no justification for appellate courts to impose that rule on the district courts just because they feel the rule would generally enhance the fairness of sentencing proceedings.

[15] If the Court rejects our submission and concludes that a district court must give notice of its intention to depart upward from the Guidelines range, it should require notice of downward departures as well. Petitioner concedes that the logic of his position requires notice in both cases, Pet. Br. 17 n.8, and the provision permitting appellate review of both upward and downward departures from the Guidelines range demonstrates Congress's intention to apply sentencing procedures even-handedly. See *United States* v. *Jagmohan*, No. 90-1045 (2d Cir. July 13, 1990), slip op. 5535 (extending "rule requiring prior notice to the defendant of a contemplated upward departure * * * to the context of a downward departure").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

ROBERT S. MUELLER, III
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

J. DOUGLAS WILSON
Attorney

SEPTEMBER 1990

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20112